

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2010-091589

01/09/2012

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT

E. Toledo

Deputy

IN RE THE MATTER OF
AMY ESPINOZA

APRIL A SPEELMON

AND

MICHAEL ESPINOZA

MICHAEL ESPINOZA
UP

DOCKET-FAMILY COURT-SE
FAMILY COURT SERVICES-CCC

JUDGMENT

The Court has had under advisement petitioner Amy Espinoza's request to enforce the provisions of a divorce decree, initiated by a petition filed on December 20, 2010 and re-urged in a request for hearing filed on March 30, 2011. A hearing was held on October 20, 2011; and post-trial briefing was completed on November 14. The Court has considered the written filings, the evidence presented at the hearing and the record in this case.

The divorce decree at issue was entered in Navajo County on November 30, 2009. At issue are possession of personal property ordered returned to Ms. Espinoza, some of which belonged to her parents, Mr. and Mrs. Cundiff; sale of a home in Show Low; payment of marital debt; payment of income taxes owing from years during which the parties were married; and payment of attorney's fees ordered in January 2011 in connection with a post-decree petition. Ms. Espinoza also asks for an award of attorney's fees in connection with the instant petition.

I.

Plainly Ms. Espinoza and the Cundiffs did not get much of what they anticipated as a result of the divorce decree. Ms. Espinoza testified that Mr. Espinoza has paid nothing toward his monetary obligations under the decree, except what he has been compelled to pay by a child

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support wage assignment. He similarly failed to turn over to her and to her parents the property that the Navajo County court ordered him to turn over.

Both Ms. Espinoza and Ms. Cundiff expressed hurt and outrage at what they see as Mr. Espinoza's flouting of his obligations. In her testimony Ms. Cundiff said, "For him to get away with this . . . I just don't understand it." Ms. Espinoza termed it "insulting." She and her mother are both looking to the Court to do "what is right," as Ms. Espinoza put it. Petitioner's Post-Trial Memorandum makes clear that they want to see Mr. Espinoza held in contempt of court and incarcerated until he complies with the various terms of the Decree. The Court fully understands Ms. Espinoza's anger and Ms. Cundiff's sense of loss.

The problem is that the Court does not have the authority to do much of what is being asked here. A divorce court has only limited "jurisdiction" (power) to enter orders in a divorce decree. The court may not exceed its jurisdiction even in the pursuit of "equity" (fairness). *Weaver v. Weaver*, 131 Ariz. 586, 643 P.2d 499, 500 (1982). When a dissolution court issues an order beyond its jurisdiction, the order cannot be enforced, at least not in the dissolution action. *Profitt v. Profitt*, 105 Ariz. 222, 462 P.2d 391, 393 (1969) (discussing, in enforcement action, whether dissolution court had authority to enter the order sought to be enforced); see *Lund v. Donahoe*, 227 Ariz. 572, 261 P.3d 456 ¶41 (App. 2011) (finding of civil contempt requires proof that the contemnor has knowledge of a *lawful* court order and the ability to comply). Regrettably, it appears to this Court that portions of the Navajo County divorce decree at issue here were beyond that court's power to enter.

In addition, a dissolution court cannot always enforce its orders through civil contempt of court. An order to pay money is not among those orders for which a disobedient party can be held in contempt jailed to force compliance. *Profitt v. Profitt*, 105 Ariz. 222, 462 P.2d 391, 393-394 (1969). Most divorce orders have to be enforced like ordinary judgments, through debt collection procedures such as garnishments and judgment liens. *Id.* As Ms. Espinoza's attorney noted at the hearing, these debt collection measures can be expensive; and sometimes they are fruitless because no property belonging to the debtor can be found. But the fact that a party is unable to enforce a judgment, by itself, does not give a judge license to take more drastic measures.

With the above principles in mind, the Court's orders are as follows.

II.

As to the unique personal property that Mr. Espinoza was ordered to return to Ms. Espinoza in the Decree, that was either her separate property ("the mementos . . . obtained in Japan,") or community property ("Logan's trophies, the hands made from the molds of the

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children's hands," "copies of the family DVDs and videos"),

THE COURT FINDS that Mr. Espinoza does still have a few of those items still in his possession. He admitted that he has some family DVDs.

IT IS ORDERED that Mr. Espinoza shall turn over to Ms. Espinoza the unique personal property in his possession, by delivering it to her attorney within 30 days of the date this Order is filed. Mr. Espinoza may produce either the originals or copies of any items that can be duplicated (electronic images, videos, photographs), provided that the duplicate item is identical to the original.

IT IS FURTHER ORDERED that, within 30 days of the date this Order is filed, Mr. Espinoza shall allow Ms. Espinoza and her attorney, accompanied by a law enforcement officer, access to the Apache Junction storage unit to identify property that belongs to Ms. Espinoza. Mr. Espinoza may be present. Disputed property may not be removed by either party. Disputes shall be resolved by mediation or judicial process.

THE COURT FURTHER FINDS that Mr. Espinoza no longer has in his possession most of the personal property that was either Ms. Espinoza's separate property or community property awarded to her in the Decree. He testified that the property was either in the marital residence or in a "white trailer" on the property. He further testified that he left the residence in order to work in Maricopa County, and that the property was not there when he returned.

Coercive civil contempt requires that the contemnor be given an opportunity to avoid punishment through compliance. *Trombi v. Donahoe*, 223 Ariz. 261, 222 P.3d 284 ¶26 (App. 2009). If Mr. Espinoza cannot now comply with the Decree because he doesn't have the property, he cannot be held in civil contempt. A money judgment can be a substitute remedy, however, especially with respect to the property that had mostly monetary value (the "food storage items"). Ms. Espinoza placed a value of \$10,000 on the property that was ordered given to her. Exhibit 2. Mr. Espinoza presented no contrary evidence. The Court therefore will adopt the values offered by Ms. Espinoza, except as to the stored food, which had been valued at \$4,000 (as opposed to \$6,000) in the report to the Navajo County Sheriff. Exhibit 11.

IT IS ORDERED entering judgment against Mr. Espinoza and in favor of Ms. Espinoza in the amount of \$8,100.00, with interest at the legal rate of 4.25% from the date of judgment.

IT IS FURTHER ORDERED that the request for an order holding Mr. Espinoza in contempt and jailing him for not turning over the property is denied.

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III.

As to the personal property belonging to Ms. Espinoza's parents, Mr. and Mrs. Cundiff,

THE COURT FINDS that the portion of the decree that ordered Mr. Espinoza to hand over that property to Ms. Espinoza exceeded the authority of the Navajo County Superior Court. "Title 25 [Marital and Domestic Relations] defines the boundaries of a dissolution court's jurisdiction, and the court may not exceed its jurisdiction even when exercising its equitable powers." *Weaver v. Weaver*, 131 Ariz. 586, 643 P.2d 499, 500 (1982). In *Weaver* the Arizona Supreme Court held that a dissolution court does not have authority to award damages in the decree for one spouse's destruction of the other's separate property, because none of the statutes in Title 25 confers such authority.¹ Likewise, nothing in Title 25 authorizes a dissolution court to enter judgment against one of the parties for conversion of a third party's property.

Because the portion of the decree meant to enforce Mr. and Mrs. Cundiff's property rights was beyond the dissolution court's jurisdiction, this Court cannot enforce it. *Profitt v. Profitt*, 105 Ariz. 222, 462 P.2d 391, 393 (1969) (discussing, in enforcement action, whether dissolution court had authority to enter the order sought to be enforced); see *Lund v. Donahoe*, 227 Ariz. 572, 261 P.3d 456 ¶41 (App. 2011) (finding of civil contempt requires proof that the contemnor has knowledge of a *lawful* court order and the ability to comply). Mr. and Mrs. Cundiff will have to file a separate lawsuit, on their own behalf, asserting their legal rights as against Mr. Espinoza.

The Court understands that this result comes as an unpleasant surprise to Mr. and Mrs. Cundiff. Obviously they have relied on the fact that the Navajo County Superior Court entered an order in their favor. At a minimum, they have refrained from taking steps that they might otherwise have taken to protect their interests. Whether that might affect the outcome of litigation in another forum, this Court cannot say. All this Court can say is that it has no power, under the law, to act on Mr. and Mrs. Cundiff's behalf in this case.

IT IS ORDERED that the petition to enforce the portion of the Decree that requires Mr. Espinoza to return "all personal property belonging to [Ms. Espinoza's] parents" is denied.

¹ *Weaver* does not foreclose a money judgment for the separate property that was supposed to be turned over to Ms. Espinoza in this case. The Navajo County court had inherent authority to enter the order directing one party to relinquish possession of the property belonging to the other. *Profitt v. Profitt*, 105 Ariz. 222, 462 P.2d 391, 393 (1969). It was *after* the entry of that order that the property was lost or destroyed. Since the order was lawful at the outset, this Court has inherent authority to enforce it, by ordering payment of an equivalent sum of money.

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IV.

As to the marital debts that Mr. Espinoza was ordered to pay in the decree,

THE COURT FINDS that Ms. Espinoza is entitled to be indemnified for all payments that she has been required to make to date, or that she may be required to make in the future, on the following debts (Exhibits 6 and 8) in the following approximate amounts:

- | | |
|---|-------------|
| 1. Arizona Public Service | \$ 118 |
| 2. Arrowhead Collections (HL Medical Specialist) | \$ 1,500 |
| 3. Asset Acceptance (Children's Place Citibank | \$ 400 |
| 4. Thunderbird Collections (Bruce Hall, M.D.) | \$ 1,100 |
| 5. ICS (Frontier Communications) | \$ 600 |
| 6. Cochise Recovery Services
(Arrowhead Mobile Healthcare) | unknown |
| 7. White Mountains Collection Agency
(White Mountains Radiology) | \$ 600 |
| 8. Outsource Receivables MG (Living Scriptures) | \$ 1,200 |
| 9. Thunderbird Collections (Susan Davies M.D.) | \$ 300 |
| 10. 1st Collection Services | unknown |
| 11. Internal Revenue Service 2004 | \$ 1,199.38 |
| 12. Internal Revenue Service 2005 | \$ 5,734.24 |
| 13. Internal Revenue Service 2006 | \$52,729.92 |
| 14. Internal Revenue service 2007 | \$ 8,351.86 |

THE COURT FURTHER FINDS that Ms. Espinoza has paid \$1,118.00, to date, to satisfy the APS, Asset Acceptance (Children's Place Citibank) and ICS (Frontier Communications) debts.

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THE COURT FURTHER FINDS that Ms. Espinoza has paid at least \$13,600.00, to date, toward the unpaid taxes.

IT IS ORDERED entering judgment against Mr. Espinoza and in favor of Ms. Espinoza in the amount of \$14,718.00, with interest at the legal rate of 4.25% from the date of judgment.

To the extent that Ms. Espinoza is required to pay on any of the above-listed debts in the future, she will be entitled to have Mr. Espinoza reimburse her. This includes the IRS debts for unpaid taxes. Because the Decree allocated the tax debt to Mr. Espinoza, he is required to indemnify Ms. Espinoza for any payments she makes to satisfy that debt, regardless of any decision the IRS may make with respect to her personal liability (e.g., regardless of whether she is deemed an "innocent spouse"). Therefore,

IT IS ORDERED that Ms. Espinoza may file future petitions for enforcement, requesting entry of judgment against Mr. Espinoza, for any additional amounts that she pays toward any of the above-listed debts. for which she is not promptly reimbursed by Mr. Espinoza.

For the sake of administrative convenience,

IT IS FURTHER ORDERED that such petitions may be filed annually, beginning in 2013 and each year thereafter. Proof of payment shall be attached to each petition. If the proof of payment demonstrates the date on which payment was made, prejudgment interest will be allowed from the date of payment under Arizona law.

The Arizona Constitution forbids imprisonment for non-payment of ordinary premarital debts allocated to a spouse in a divorce decree. *Profitt v. Profitt*, 105 Ariz. 222, 462 P.2d 391, 393-394 (1969). Therefore,

IT IS FURTHER ORDERED that, to the extent Ms. Espinoza is requesting an order holding Mr. Espinoza in contempt and jailing him for not paying the debts allocated to him in the Decree, the request is denied.

Because the Court has authority in this dissolution action to address the debt to Ms. Espinoza's parents only as between the spouses (by ordering either to repay the other for any payments over and above each spouse's \$7,500 share of the debt) and not as between a spouse and the parents,

IT IS FURTHER ORDERED denying the petition to enforce to the extent it seeks to compel Mr. Espinoza to pay his \$7,500 share of the debt to Ms. Espinoza's parents.

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This Court is also unable to change an IRS determination of tax liability, either by a direct order or by an order to someone else acting as a surrogate. Again, the Court has authority only as between the parties to the dissolution action. Accordingly,

IT IS FURTHER ORDERED denying the request to compel Mr. Espinoza "to contact the IRS and assume the entire tax obligation."

V.

As to the judgment for attorney's fees entered by Judge Abrams on November 2, 2010,

Family Court judgments may be collected like any other judgment. Upon inquiry after the hearing in this case, the Court learned that the Maricopa County Superior Court treats Family Court collection matters (other than collection of judgments based on child support or spousal maintenance) as civil matters governed by Rule 69 of the Arizona Rules of Civil Procedure. Rule 69 makes discovery (debtor's examinations, production of documents relating to income and assets, etc.) available in that forum. Therefore,

IT IS ORDERED that Ms. Espinoza's request that this Court order disclosure concerning Mr. Espinoza's bank accounts and assets is denied, without prejudice to future collection efforts under the Arizona Rules of Civil Procedure.

VI.

Because Ms. Espinoza was not successful in obtaining most of the relief she sought in her petition to enforce, primarily because many of her arguments were not supported by the law,

IT IS ORDERED denying Ms. Espinoza's request for reimbursement of her attorney's fees in connection with the petition to enforce.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81(D), Arizona Rules of Family Law Procedure.

/s/: JOHN HANNAH

THE HONORABLE JOHN R. HANNAH
JUDICIAL OFFICER OF THE SUPERIOR COURT

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All parties representing themselves must keep the Court updated with address changes.
A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.